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No. 83-233

In The
Supreme Court of the United States
October Term 1983

COLORADO RIVER INDIAN TRIBES,
Petitioner,

vs.

GERALD ARANSON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this court grant discretionary review of a case where the issues presented for review were:

1. Not presented to the Court of Appeals; or
2. Remanded by the Court of Appeals to the District Court for consideration; or
3. Correctly decided by the Court of Appeals in accordance with this court's recent decision in *Montana v. United States* (1981) 450 U. S. 544?

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Respondent, the State of California, hereby submits this brief in opposition to the Petition for a Writ of Certiorari which seeks review of a decision by the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at *United States v. Aranson* (1983) 696 F. 2d 654. The judgment and findings of the United States District Court for the Central District of California

were not reported; they are attached to the petition as Supplemental Appendices E and F.

JURISDICTION

Petitioners seek to invoke this court's jurisdiction under 28 United States Code section 1254(1). For the reasons outlined below, it is recommended that the court decline to exercise its jurisdiction in this case.

STATUTORY PROVISIONS INVOLVED

Act of September 9, 1850, chapter 50, 9 Statutes 452

The description of California's boundaries appears in California's Constitution of 1849 which was approved by Congress on September 9, 1850. (Act of September 9, 1850, ch. 50, 9 Stats. 452; exh. 6.) It describes California's eastern boundary as:

> ". . . Commencing at the point of intersection of the forty-second degree of north latitude with the one hundred-twentieth degree of longitude west from Greenwich, and running south on the line of said one hundred-twentieth degree of west longitude until it intersects the thirty-ninth degree of north latitude; thence running in a straight line in a southeasterly direction *to the River Colorado, at a point where it intersects the thirty-fifth degree of north latitude; thence down the middle of the channel of said river, to the boundary line between the United States and*

> *Mexico,* as established by the treaty of May thirtieth, one thousand eight hundred forty eight; . . . ." (Cal. Const. of 1849, art. XII (1853); Cal. Comp. Laws at 584; exh. 5. Emphasis added.)

The State of California includes the western half of the Colorado River. This act also provides that California is to be "admitted into the Union on an equal footing with the original states in all respects whatever." (Act of September 9, 1850, ch. 50, 9 Stats. 452, § 1.)

Act of September 9, 1850, chapter 49, 9 Statutes 446

On the same day that California was admitted to the Union, Congress created the Territory of New Mexico. (Act of September 9, 1850, ch. 49, 9 Stats. 446 at 447, et seq.) The act describes the new territory's boundaries as follows:

> "*Beginning at a point in the Colorado River* where the boundary line with the republic of Mexico crosses the same; thence eastwardly with the said boundary line to the Rio Grande; thence following the main channel of said river to the parallel of the thirty-second degree of north latitude; thence east with said degree to its intersection with the one hundred and third degree of longitude west of Greenwich; thence north with said degree of longitude to the parallel of thirty-eight degree of north latitude; thence west with said parallel to the summit of the Sierra Madre; thence south with the crest of said mountains to the thirty-seventh parallel of north latitude; *thence west with said parallel to its intersection with the boundary line of the State of California; thence with said boundary line to the place of beginning.*" (Emphasis added.)

Thus, the Territory of New Mexico included the eastern half of the bed of the Colorado River.

Act of February 24, 1863, chapter 56, 12 Statutes 664

Twelve years later the Territory of Arizona was established from that portion of the Territory of New Mexico which included the eastern half of the Colorado River. (Act of February 24, 1863, ch. 56, 12 Stats. 664.) The act provides:

> "That all that part of the present Territory of New Mexico situate west of a line running due south from the point where the southwest corner of the Territory of Colorado joins the northern boundary of the Territory of New Mexico to the southern boundary line of said Territory of New Mexico be, and the same is hereby, erected into a temporary government by the name of the Territory of Arizona."

Arizona was declared a state on an equal footing with all other states in 1912. (Proclamation of February 14, 1912, 37 Stats., pp. 1728-1729.)

Act of March 3, 1865, chapter 127, 13 Statutes 541

Three years later, the Colorado River Indian Reservation (CRIR) was created within the boundaries of the Territory of Arizona (Act of March 3, 1865, ch. 127, 3 Stats. 541, 559.) The act in relevant part provided:

> "All that part of the public domain *in the Territory of Arizona*, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries." (Emphasis added.)

STATEMENT OF THE CASE

This is a quiet title action initiated in 1972 by the United States on behalf of the Indian Tribes (Tribes) of the CRIR. The dispute concerns the location of the western boundary of that reservation and the Colorado River. The United States named the private property owners in the area and California as defendants. California was named because of her interest in the western half of the bed of the Colorado River.

The trial of this case was conducted during November 1976. The District Court issued its judgment and findings on February 11, 1977. (See Supp. Appens. E and F to the Petition).

The District Court found that the median line of the Colorado River was the western boundary of the CRIR (Finding 13). The court concluded that California owned the western half of the bed of the Colorado River (Findings 2 and 15). The court also determined that the Colorado River allusively changed its location in 1920 creating an abandoned loop known as the Olive Lake Bend (Finding 10). Consequently, the District Court concluded that the western boundary of the CRIR was the median line of Olive Lake Bend; California owned the abandoned riverbed west of the median line.

The District Court's conclusion that California owns the western half of the bed of the Colorado River was not appealed. Indeed, the Court of Appeals recognized that that aspect of the District Court's judgment is *res judicata* and binding on the parties to that judgment. (*United States v. Aranson, supra,* 696 F. 2d at 662.)

The private parties did appeal two other aspects of the District Court judgment. First, they argued that state law should have been applied and that state law would have affected the District Court's determination of the location of the Colorado River. (See *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.* (1977) 429 U. S. 363.) Second, the appellants argued that the CRIR did not include the eastern half of the riverbed; it was held in trust by the United States for the future state of Arizona. (See *Montana v. United States* (1980) 450 U. S. 544.) However, the appellants also contend that they adversely possessed any interest that Arizona may have to the eastern half of the riverbed.

Arizona, which was not a party to the District Court judgment, was granted leave to intervene on appeal. Arizona agreed with the appellants that the CRIR did not include the eastern half of the riverbed. However, Arizona disagreed with the contention that her sovereign interest in the eastern half of the riverbed was lost by adverse possession.

The Tribes were also granted leave to intervene on appeal. The Tribes recognized that they had received a favorable judgment in the District Court as a result of the United States representation. However, the Tribes were concerned that the United States might concede certain issues on appeal in light of the *Montana v. United States* case.

Although California did not appeal the District Court judgment, she did file an amicus curiae brief in the Court of Appeals on the choice of law issue. California argued that state law should be adopted as the federal rule of

decision. (See *Wilson v. Omaha Indian Tribe* (1979) 442 U. S. 653.) However, California also noted that the adoption of state law would not have affected the outcome in this case. (See *Carpenter v. Santa Monica* (1944) 63 Cal. App. 2d 772.)

After rehearing, the Court of Appeals issued its decision on January 7, 1983. That decision was divided into two parts. In the first half of the decision, written by Judge Sneed, the court agreed with the arguments raised in California's amicus curiae brief. The court held that although federal law would adopt state law as the rule of decision, the application of state law would not have affected the location of the river or outcome in this case. Consequently the Court of Appeals affirmed this aspect of the District Court's judgment.

In the second half of the decision, written by Judge Trask, the court discussed the issue of whether the CRIR includes the eastern half of the Colorado Riverbed. The court held that the United States, when creating the CRIR, did not intend to convey the eastern half of the riverbed to the Tribes. The eastern half of the riverbed was held in trust for the future state of Arizona. (*Montana v. United States, supra.*) The court reversed the District Court judgment and remanded it for a determination of the east bank of the river, the correct boundary of the CRIR. The court also remanded the case to determine the issue of aboriginal title, which was presented for the first time on appeal.

ARGUMENT

A. The District Court's Determination That California Owns The Western Half Of The Colorado Riverbed Was Not Appealed And Is Binding On All The Parties.

The District Court specifically found that California owns the western half of the Colorado Riverbed in her sovereign capacity. (See Petition Supplemental Appens. E and F.) The Court of Appeals recognized that this determination was not appealed and therefore was final and binding on the parties. (*United States v. Aranson, supra,* 696 F. 2d 654, at p. 662.) Despite these facts, the petitioner is now apparently claiming an interest in the western half of the Colorado Riverbed. (See Petition, pp. 18-19.)

The petitioner states that the District Court made no findings with respect to California's interest in the western half of the riverbed. (See Petition, p. 4, fn. 1.) This is blatantly incorrect. The District Court made very specific findings with respect to California's interest in the riverbed. (See Petition, Supplemental Appens. E and F.)

The District Court's Findings of Fact No. 2 and 15 provide that:

> "2. The Executive Order of May 15, 1876 (admitted in evidence herein as Exhibit 90) *purported to include within said reservation the entire bed of the Colorado River; however, prior thereto by the Act of September 9, 1850* (9 Stat. 452), *Congress admitted California to statehood, and the eastern boundary of the state of California at that time, as pertinent to this lawsuit, was acknowledged by Congress to be the*

mid-line of the Colorado River. The Act of September 9, 1850, admitted California on an equal footing with the original States; hence, because the Colorado River has been held to be navigable in this reach by the United States Supreme Court, *California obtained title to the west one-half of the river bed on said date.* Accordingly, the Executive Order of May 15, 1876, effectively reserved to the Colorado River Indian Tribes only the east half of the bed of the Colorado River, and to *the extent that said Order purported to include within the reservation the west half of the bed of the river, it was ineffective.*"

"15. *All that part of the abandoned bed of the Colorado River lying westerly of the median line* described on Exhibit 9, as of the time the river commenced flowing through the cut-off constructed by the Palo Verde Mutual Water Co. *is owned by the State of California.*" (Emphasis added.)

Furthermore, Conclusion of Law No. 29 concludes that:

"29. Plaintiff is entitled to have judgment quieting its title to the lands described in paragraph 28 above, as against all defendants and to have judgment that the boundary line between the plaintiff's lands and the *land owned by the State of California in the abandoned river bed of the Colorado River is the traverse of the median line of said abandoned channel* as shown and described on said plat of survey described in paragraph 28 above." (Emphasis added.)

The District Court could not have been more explicit; California owns the western half of the riverbed. Based on this determination the District Court entered a judgment against all defendants *except* the State of California.

Obviously, California did not appeal the favorable District Court's judgment; nor did the United States. As noted above, the Court of Appeals recognized that this issue was not appealed and was therefore binding on the

parties. This Court does not ordinarily consider issues which were not presented to or considered by the Court of Appeals. (See *Adickes v. Kress & Co.* (1979) 390 U. S. 144, 147.)

Furthermore, the District Court's determination is binding on the Tribes, even though they had not yet intervened when the District Court rendered its judgment. The Tribes were represented by the United States on District Court level. This Court recently held, in an analgous situation, that the principles of res judicata and finality would govern where Indians intervene after an issue has been adjudicated. (*Arizona v. California* (March 30, 1983) — U. S. —, 103 S. Ct. 1382.) This Court, in language equally applicable to this case, held that:

> "Finally, the absence of the Indian Tribes in the prior proceedings in this case does not dictate or authorize relitigation of their reserved rights. As a fiduciary, the United States had full authority to bring the *Winters* rights [water rights] claims for the Indians and bind them in the litigation. *Heckman v. United States*, 224 U. S. 413 (1912). (Fn. omitted.) We find no merit in the Tribes contention that the United States' representation of their interests was inadequate whether because of a claimed conflict of interests arising from the government's interest in securing water rights for other federal property, or otherwise. The United States often represents varied interests in litigation involving water rights, particularly given the large extent and variety of federal land holdings in the West. See, e.g. *Colorado River Water Cons. District v. United States*, 424 U. S., at 805. The Government's representation of these varied interests does not deprive our decisions of finality."

Likewise, the United States had authority to represent the Indians in this case before the District Court.

The District Court determination that California owns the western half of the riverbed was not appealed. Furthermore, the Tribes are not claiming that United States' representations was inadequate. In fact, as noted above, the Tribes contend that the District Court's decision is "favorable to the Tribes" and should be affirmed. (See Petition, p. 4.) The District Court judgment that California owns the western half of the bed of the Colorado River is therefore final and binding on both the United States and the Tribes.[1]

B. The Court Of Appeals Correctly Concluded That The Eastern Half Of The Bed Of The Colorado River Was Not Conveyed To The Tribes As A Part Of The Reservation.

After extensive briefing and deliberation the Court of Appeals reached the conclusion that the federal government did not convey the eastern half of the Colorado Riverbed to the Tribes as a part of the CRIR. (*Montana, et al. v. United States, et al.* (1981) 450 U. S. 544.) This conclusion was inescapable in light of the principles outlined in *Montana v. United States, supra.*

In *Montana v. United States* the court outlined the "general principle" that the federal government holds lands under navigable waters "in trust for future states,

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1. Even if the arguments raised by the Tribes were not barred, they could not have changed the outcome. First, the statute relied on by the Tribes (1862 Cal. Stats. 432) could not operate to convey state sovereign lands. (See *Illinois Central Railroad Co. v. Illinois* (1892) 146 U. S. 387 and *People v. California Fish* (1913) 166 Cal. 576.) Second, the Tribes' reliance on the Boundary Compact between Arizona is equally misplaced. The Compact established the political boundaries of the state; it had no effect on land titles, "public or private." (See Cal. Govt. Code, § 175; Arizona Rev. Stats. ann., §§41-522.)

to be granted to such states, when they enter the Union and assume sovereignty on an 'equal footing' with the established states." (*Id.* at p. 551.) There is a strong presumption against the conveyance of such lands by the United States. "[I]t will not be held that the United States conveyed such land except because of 'some international duty of public exigency'." The intention for such a conveyance must be "definitely declared" and made in "clear and especial words." (*Id.* at p. 552.)

Applying these principles to this case, the Court of Appeals determined that the eastern half of the bed of the Colorado River was not conveyed to the Tribes; it was held by the United States in trust for the future State of Arizona. The statutes and executive orders creating the CRIR are at best, from the petitioner's point of view, ambiguous. The intent to convey is not "definitely declared" in "clear and especial words." They contain no language which comes close to clearly conveying the eastern half of the riverbed to the Tribes. Furthermore, congressional intent could not be inferred from the lifestyle of the Tribes. As determined by the Court of Appeals: "The record does not reflect that the Indians were so dependent on the river that Congress would have intended to depart from the equal footing doctrine and convey the riverbed." (*United States v. Aranson, supra,* at p. 666.)[2] Conse-

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2. The Tribes place a great deal of emphasis on the fact that they used the waters of the Colorado River for irrigation purposes. However, the Tribes' water rights have already been established and do not include ownership of the bed of the river. (See *Arizona v. California* (1963) 373 U. S. 546, 599.) Furthermore, the Tribes' cultivation of the uplands adjacent to

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quently, the United States held the eastern half of the riverbed in trust for Arizona. (*Montana v. United States, supra; United States v. Holt State Bank* (1926) 270 U. S. 48.)

The Tribes conspicuously avoid a detailed discussion of the *Montana v. United States* case. Furthermore, they do not even mention *United States v. Holt State Bank, supra,* the other major case relied on by the Court of Appeals.

Instead the Tribes rely almost entirely on the case of *Choctaw Nation v. Oklahoma* (1970) 397 U. S. 620. That case was described by this Court as the "singular exception" to an "established line of cases" which have established that a reservation grant does not include the beds of navigable waters. (*Montana v. United States, supra,* at pp. 542-543, see also *United States v. Holt State Bank, supra.*) Special historical considerations and a fee simple conveyance to the Indians combined to create this singular exception. The Court of Appeals, as outlined above, correctly concluded that such unique facts are not present in this case.

Similarly, the petitioners' reliance on *Alaska Pacific Fisheries v. United States* (1918) 248 U. S. 78, is misplaced. First, as pointed out by the Court of Appeals, the history and lifestyle of the tribes in this case do not

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the riverbed does not establish their ownership to the riverbed. In fact, a riverbed by definition has no value for agricultural purposes. (See Black's Law. Dict. (rev. 4th ed.) p. 195, defining river "bed".)

provide grounds for an exception to the equal footing doctrine. Second, the *Alaska Pacific Fisheries* case, unlike the present case, or *Montana v. United States, supra,* did not involve a dispute between the Indians and a State or its grantees. Indeed the dispute, which was between the United States against a trespasser, took place before Alaska was admitted to the Union. The equal footing doctrine was not in issue. In essence, the United States was protecting the rights of the future State of Alaska as well as those of the Indians. (See the Court of Appeals decision which was affirmed by this Court in *Alaska Pacific Fisheries, supra. Alaska Pacific Fisheries v. United States* (1917) 240 Fed. 274.) This fact makes the *Alaska Pacific Fisheries* decision consistent with, not contrary to, the *Montana v. United States* and *United States v. Holt State Bank* cases. The beds of navigable waters are held in trust by the United States for future states. In this case the eastern half of the Colorado Riverbed was held in trust for Arizona.

C. The Petitioner's Arguments Concerning Aboriginal Title Are Premature And Should Be Decided By The District Court On Remand.

The bulk of the petition for writ of certiorari in this case is apparently designed to establish the Tribes' aboriginal title to the riverbed. This argument is premature. The Court of Appeals recognized that there was no evidence in the record concerning aboriginal title to the eastern half of the riverbed. (*United States v. Aranson, supra,* at p. 666.) Consequently, the Court of Appeals remanded this issue so all parties would have an opportunity to address it.

There is no point in this Court rendering a decision before these issues are considered by the District Court on remand and the record is complete. This is a case where it is "desirable to wait and see," and where it is therefore and appropriate to refuse a grant of certiorari. (See *Darr v. Burford* (1950), 339 U. S. 200, 227 (Frankfurter, dissenting.)

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: September 19, 1983.

Respectfully submitted,

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